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TAJUDEEN MK SYED MOHAMED v. ZMS CONSTRUCTION

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE JC
[CIVIL SUIT NO: WA-11AC-04-12-2017]
27 APRIL 2018

B

CIVIL PROCEDURE: *Judgments and orders – Setting aside – Judgment in default of appearance – Whether there was delay in application to set aside judgment in default – Service of judgment in default by AR registered post with AR card returned unacknowledged – Whether evidence of receipt of judgment in default – Whether application made to set aside judgment in default made beyond 30 days prescribed in O. 42 r. 13 of Rules of Court 2012 – Interpretation Acts 1948 and 1967, s. 12*

C

CIVIL PROCEDURE: *Judgments and orders – Setting aside – Judgment in default of appearance – Whether writ and statement of claim properly served – Whether effected by means of AR Registered post – Mere denial of receipt of writ and statement of claim and absence of any acknowledgment in AR card – Whether sufficient to rebut presumption of service under s. 12 of Interpretation Acts 1948 and 1967*

D

CIVIL PROCEDURE: *Judgments and orders – Setting aside – Judgment in default of appearance – Claim for monies due under construction contract – Whether there were defects and damages in house built – Failure to produce particulars or evidence to prove defects or damages – Whether any prima facie defence on merits of claim established – Whether issues that arose premature in respect of judgment in default of appearance*

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The respondent entered into a construction agreement with the appellant. Under this agreement, the respondent was to construct a dwelling house for the appellant. Subsequently, the respondent issued a writ from the Kuala Lumpur Magistrate's Court endorsed with a statement of claim. The respondent's claim against the appellant was for monies due under the said construction contract. On 21 September 2016, a judgment in default of appearance was entered against the appellant. On 31 October 2017, the appellant filed a notice of application to set aside the judgment in default. The application was dismissed. Hence, this appeal. The appellant submitted that the writ and statement of claim were not properly served and this made the judgment in default irregular and liable to be set aside as of right. The appellant also argued that there were merits to the appellant's proposed defence to the respondent's claim in this action and that one of the advocates and solicitors in the respondent's solicitors' firm was conflicted from acting in this matter. The respondent denied the contentions made by the appellant and submitted that the appellant's application to set aside the judgment in default was filed out of time.

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Held (dismissing appellant's appeal):

(1) In regards to the appellant's alleged delay in applying to set aside the judgment in default, the appellant claimed that he had only received the judgment in default on 25 October 2017. The respondent, on the other hand, maintained that the judgment in default was served by the respondent's solicitors by AR registered post. There was however no acknowledgment of receipt by the appellant on the AR card. The 30-day time limit prescribed under O. 42 r. 13 of the Rules of Court 2012 ('the ROC') for an application to set aside a judgment was predicated on, and reckoned from, the receipt of the judgment by the applicant. Without the presumption afforded under s. 12 of the Interpretation Acts 1948 and 1967, mere service of the judgment in default by means of AR registered post with the AR card returned acknowledged, was no evidence of receipt of the judgment in default by the appellant. There was, in effect, no evidence that the appellant had received the copy of the judgment in default that was said to have been served by way of AR registered post. The appellant's explanation that he only received a copy of the judgment in default on 25 October remained unrebutted. In the circumstances, the 30 days for setting aside the judgment in default would reckon from 25 October 2017 with the consequence that the appellant's application made on 31 October 2017 was not made beyond the 30 days prescribed in O. 42 r. 13 of the ROC. (paras 13-21)

(2) There was evidence in the form of the affidavit of service that service of the writ and statement of claim were effected by means of AR registered post. Order 10 r. 1 of the RHC neither requires that the AR card be returned acknowledged by the defendant to be served nor should the court imply such a requirement. The appellant had merely denied receipt of the writ and statement of claim and had pointed out that there was absence of any acknowledgment by him in the AR card. This was not sufficient to rebut the presumption of service under s. 12 of the Interpretation Acts 1948 and 1967. In addition, O. 13 r. 7(b) of the ROC does not require the writ and statement of claim to be exhibited in an affidavit of service before a judgment in default may be secured thereunder. There was a presumption that the appellant had been served with the writ and statement of claim and that presumption had not been rebutted by the appellant. (paras 48-54)

(3) Despite the appellant's allegations that there were defects and damages in the house that was built for him by the respondent, the appellant had not produced any particulars of such defects or damage. He had not produced any evidence of any such defects either by himself on oath or otherwise. It was merely a general allegation without particulars and

A therefore, without evidence of the defects or damage complained of. The appellant had not established that he had any *prima facie* defence on the merits of the respondent's claim in this action. (paras 58-60)

(4) In regards to the appellant's allegation that one of the advocates and solicitors in the respondent's firm was in a position of conflict as he may B be called as a witness in the trial of the action, this court was of the view that these objections did not render the judgment in default irregular or provide a defence to the claim by the respondent on the merits. These were matters more appropriately the concern of the Disciplinary Board of the Malaysian Bar. In addition, no appearance had been entered to C this action by the appellant. Whether the advocate and solicitor would have to testify were issues the consideration of which were premature in respect of a judgment in default of appearance. (paras 63 & 64)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee) [1994] 2 CLJ D *1 SC* ***(refd)***

Anna Yap May May v. Tetuan Lim Aik Huck & Company [2017] 1 LNS 2104 HC ***(refd)***

Berjaya Land Bhd v. Wong Chee Hie & Ors [2012] 4 CLJ 356 HC ***(refd)***

Chung Wai Meng v. Perbadanan Nasional Bhd [2017] 1 LNS 892 CA ***(refd)***

Evans v. Bartlam [1937] AC 473 ***(refd)***

E *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd [1994] 1 CLJ 328 SC* ***(refd)***

MBF Finance Bhd v. Tiong Kieng Seng [2001] 4 CLJ 38 HC ***(refd)***

Public Bank Bhd v. Rasatulin Holdings Sdn Bhd & Ors [1988] 1 LNS 170 HC ***(refd)***

Sivamurthy Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja [2012] 9 CLJ 598 CA ***(refd)***

F *Syarikat Joo Seng & Anor v. Habib Bank Ltd [1986] 1 LNS 91 SC* ***(refd)***

TO Supplies (London) LD v. Ferry Creighton LD [1952] 1 KB 42 ***(refd)***

Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC ***(refd)***

Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

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Legislation referred to:

Interpretation Acts 1948 and 1967, s. 12

Rules of Court 2012, O. 10 r. 1, O. 13 rr. 7(b), 8, O. 41 r. 11(1), O. 42 r. 13

For the plaintiff - M/s Amin Petra & Partners

H *For the defendant - M/s The Law Office of Mohanna & Co*

Reported by Suhainah Wahiduddin

I

JUDGMENT

Darryl Goon Siew Chye JC:

[1] This is an appeal against a decision of the Kuala Lumpur Magistrate's Court of 11 December 2017. It concerns the dismissal of an application to set aside a judgment in default. It also concerns an important practical issue on the service of writs in respect of which there are conflicting decisions of the Court of Appeal and requires consideration.

[2] The respondent, ZMS Construction, issued a writ from the Kuala Lumpur Magistrate Court on 8 August 2016 endorsed with a statement of claim. The respondent's claim against the appellant is for monies due under a construction contract. On 21 September 2016 a judgment in default of appearance was entered against the appellant, Tajudeen bin MK Syed Mohamed. It was for a sum of RM70,000 with interest at the rate of 8% per year from 21 September 2016 to full payment and cost of RM600.

[3] On 31 October 2017, the appellant file a notice of application to set aside the judgment in default. This application was dismissed by the learned Magistrate on 11 December 2017. Hence this appeal, which was filed also on 11 December 2017.

The Issues Raised

[4] Several issues are raised in this appeal.

[5] On the part of the appellant there is a contention that the writ and statement of claim were not properly served. This made the judgment in default irregular and liable to be set aside as of right. As was stated by the Federal Court in *Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30, the general rule is that when it is demonstrated clearly that a judgment has not been regularly obtained, it may be set aside *ex debito justitiae*, irrespective of the merits and without terms.

[6] There is, in addition, a contention that there are merits to the appellant's proposed defence to the respondent's claim in this action. There is also a contention that one of the advocates and solicitors in the respondent's solicitors' firm is conflicted from acting in this matter.

[7] These contentions are denied by the respondent. In addition, the respondent contends that the appellant's application to set aside the judgment in default was filed out of time. This therefore becomes the first point for consideration in this appeal.

Was The Application To Set Aside Filed Out Of Time?

[8] The application to set aside the judgment in default was filed on 31 October 2017. This was over 13 months after the judgment in default.

[9] Order 42 r. 13 of the Rules of Court 2012 states as follows:

> **13. Setting aside or varying judgment and orders**
>
> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[10] The provision for setting aside of judgments is provided under O. 13 r. 8 which states as follows:

> **8. Setting aside judgment**
>
> The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

[11] The order referred to in r. 8 is O. 13. Order 13 deals with judgments in default of appearance.

[12] Therefore, by reason of the foregoing, the appellant had 30 days, after his receipt of the judgment in default, to apply to set it aside.

[13] The appellant has an explanation for his delay. He contends, on affidavit, that he only received the judgment in default on 25 October 2017. He states that on that day, several court officials (who turned out to be bailiffs) called on him to execute the judgment in default. This was when he was served with a copy of the judgment in default together with a writ of seizure and sale and other documents for purposes of execution. The notice of sale that is exhibited in the plaintiff's affidavit in reply as exh. "ZMS2" discloses that bailiffs did seize items at the appellant's premises on 25 October 2017. This corroborates the appellant's statement that court officials called at his premises on that day.

[14] The respondent on the other hand maintains that the judgment in default was served by the respondent's solicitors by A.R. registered post. The respondent's solicitors' letter enclosing the judgment in default was addressed to the appellant at "AL-10, Lot 8656, Jalan Tioman 2, Taman Setapak Garden, 53300 Kuala Lumpur, Wilayah Persekutuan". This is the same address given by the appellant in his affidavits in support of his application to set aside the judgment in default affirmed on 30 October 2017. It is also the address given in his affidavit in reply of 30 November 2017. The respondent's solicitors' letter enclosing a copy of the judgment in default is dated 28 September 2016.

[15] There was however no acknowledgement of receipt by the appellant on the A.R card. The A.R card was returned unacknowledged by the appellant on 30 September 2016. Exhibit "ZMS6" to respondent's affidavit of 16 November 2017 shows the A.R card with the name "AMELIA" next to the word "Penerima". The respondent explains that Amelia is an ex-clerk in the respondent's solicitors' firm.

[16] Section 12 of the Interpretation Acts 1948 and 1967 (Act 388) provides as follows:

> **Service by post**
>
> 12. Where a written law authorizes or requires a document to be served by post, then, until the contrary is proved, service:
>
> (a) shall be presumed to be effected by properly addressing prepaying and posting by registered post a letter containing the document; and
>
> (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.

[17] In my view, and I agree with submissions for the appellant, s. 12 does not apply to the service of judgments in default. Section 12, and the presumption it provides, applies only where any "... written law authorizes or requires a document to be served by post ...". Although there is no reason why a judgment in default may not be served by A.R. registered post, there is however no written law that actually authorises or requires a judgment in default to be served by post.

[18] The respondent's evidence of service of the judgment in default on the appellant rests on a copy of it being served as a foresaid. As stated above, there is no requirement that a judgment in default must be, or any written law that states that a judgment in default may be, served by A.R. registered post. However, the respondent chose to give notice by serving a copy of the judgment in default by A.R. registered post. As Siti Norma Yaakob J (as she then was) stated in *Public Bank Bhd v. Rasatulin Holdings Sdn Bhd & Ors* [1988] 1 LNS 170; [1989] 1 MLJ 47 at p 48:

> In this instant case, rather than sending the notices by ordinary post, the solicitors chose to send them by way of AR registered post and by doing so, the plaintiff has varied cl 8 of both guarantees. By so choosing, the plaintiff has also burdened themselves with the added responsibility of seeing that the AR cards shall be returned to them duly acknowledged by the fourth and fifth defendants, for there to be proper service of such notices on them. In this case both the AR cards were returned with the endorsements 'Kembali tidak boleh di tuntut'. As there is no proper and effective service of such notices on the fourth and fifth defendants, this in itself affords a defence to both of them.

[19] The A.R. card being returned without any acknowledgment of receipt by the appellant is therefore no evidence that the appellant was served with a copy of the judgment in default. Particularly, as in this case, where the A.R. card was returned with the name of a different person acknowledging receipt thereof. As stated, s. 12 of the Interpretation Acts 1948 and 1967 does not apply. It is therefore of no assistance to the respondent. I would add that this is not to say that service of a judgment in default can never be achieved by means of A.R. registered post. Depending on the facts and circumstances of a case, a court may well conclude that a judgment debtor had received a copy of a judgment in default which had been sent by A.R. registered post.

[20] The 30 day time limit prescribed under O. 42 r. 13 of the Rules of Court 2012 for an application to set aside a judgment is predicated on, and reckons from, the receipt of the judgment by the applicant. Without the presumption afforded under s. 12 of the Interpretation Acts 1948 and 1967, mere service of the judgment in default (or indeed any document) by means of A.R. registered post with the A.R. card returned unacknowledged, is no evidence of receipt of the judgment in default by the appellant.

[21] I am therefore of the view that there is in effect no evidence that the appellant received the copy of the judgment in default that was said to have been served by way of A.R. registered post. The explanation of the appellant that he only received a copy of the judgment in default on 25 October 2017 thus remains unrebutted. In the circumstances, the 30 days for setting aside the judgment in default would reckon from 25 October 2017 with the consequence that the appellant's application made on 31 October 2017, was not made beyond the 30 days prescribed in O. 42 r. 13.

[22] Having so decided, the contention that the appellant did not apply for any extension of time to make his application to set aside the judgment in default is of no relevance. He was not out of time in making his application.

Was The Writ And Statement Of Claim Served On The Appellant?

[23] The appellant then contends that the writ and statement of claim were not served on him. He maintains that the respondent had failed to adduce evidence of posting or proof of acceptance of the writ of summons and statement of claim. He also contends that the affidavit of service of the writ of summons and statement of claim exhibited as exh. "Z3" in the respondent's affidavit in reply of 8 December 2017, affirmed by one Haji Mohamed Shah bin Mohamed Kassim, failed to exhibit copies of those documents. This, the appellant contends, renders the judgment in default irregular and liable to be set aside as of right.

[24] The respondent however maintains that the writ and statement of claim were served by way of A.R. registered post, on 23 August 2016, together with a covering letter dated 19 August 2016 by the respondent's solicitors. An affidavit of service was affirmed to that effect by one Saravannan Kumar a/l Rengasamy who is a clerk in the respondent solicitors' legal firm. It is also stated in para. 4 of that affidavit that copies of the writ and statement of claim are exhibited as exh. "ZMS1". This affidavit of service was affirmed on 5 September 2016. The A.R. card however was returned without any acknowledgment of receipt.

[25] Order 10 r. 1 of the Rules of Court 2012 states that a writ must be served either personally or "sent to each defendant by prepaid A.R. registered post addressed to his last known address". The respondent maintains that this then brings into operation s. 12 of the Interpretation Acts 1948 and 1967 (Act 388) and the presumption therein provided. The respondent maintains that it is entitled to rely on s. 12.

[26] The appellant however maintains that the law now requires proof of actual service. This submission is based on the fairly recent decision of the Court of Appeal in *Chung Wai Meng v. Perbadanan Nasional Bhd* [2017] 1 LNS 892; [2017] 1 MLJU 814. In that case the Court of Appeal held that:

> [28] There is no proof by the Respondent that the Writ and SOC which were sent by AR registered post to the Appellant's Jalan Thai address had been duly served on the Appellant. The AR registered acknowledgement card duly signed by the Appellant has not been produced.

[27] In so holding the Court of Appeal in *Chung Wai Meng* declined to follow two of its earlier decisions namely *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175 and *Sivamurthy Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja* [2012] 9 CLJ 598.

[28] In *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 174 James Foong JCA (as he then was) stated that:

> [30] In respect of this defendant, the prepaid A.R. registered post acknowledgement card was not returned. But, following what we have expounded earlier, this does not mean that the service of the writ and statement of claim is deemed defective. What is demanded in O. 10 r. 1 RHC is that the writ (and in this case including the statement of claim) be sent by prepaid AR registered post to the defendant's last known address. When there is sufficient evidence of posting, as it is in this case, then under the rules, the writ (and statement of claim)is deemed to be served on the defendant. There is no necessity to prove that the acknowledgment of the A.R registered posting has been returned.

[29] Thus, it is the view in *Yap Ke Huat* that with sufficient evidence of posting, under O. 10 r. 1, "... the writ (and statement of claim) is deemed to be served on the defendant". This view was followed by the subsequent decision of the Court of Appeal in *Sivamurthy Muniandy & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja* [2012] 9 CLJ 598.

[30] The Court of Appeal in *Chung Wai Meng* however stated that:

> [31] With respect, despite the decisions in *Sivamurthy (supra)* and *Yap Kee Huat (supra)*, we take note of the majority of the High Court decisions and authorities in Malaysia, and Commonwealth cases, to which we agree, on the requirement that the AOS must be 'proving due service of the writ on the defendant' as provided in O. 13 r. 7(1)(b) of the ROC.

[31] The Court of Appeal in *Chung Wai Meng* also quoted with approval the above quoted passage by Siti Norma J (as she then was) in *Public Bank Bhd* stating that:

> [34] Following the above decision (of Public Bank Bhd), if a party entitled to utilise the registered post method chooses instead to use the AR registered post, it is then incumbent on the party to produce the AR card to evidence acknowledgement of receipt.

[32] The Court of Appeal however, went on to adopt the views expressed in *MBF Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ 38 at p 46 by Clement Skinner J (as he then was) where the learned judge stated that:

> I, however, agree with the submission of counsel for the respondent that the written receipt given under the Post Office Rules constitutes *prima facie* and not conclusive proof of service – it would not preclude or prevent a defendant from trying to show that there had been some irregularity in the service because the presumption of service that arises under the Interpretation Act is a rebuttable one and, as often happens where a summons is served by post and is not returned unserved, the court acts on the plaintiff's proof of posting and any documents relied on in support thereof at their face value when they are exhibited to an affidavit of service and will not be aware of any alleged irregularities or defects of service until challenged.

[33] In *Chung Wai Meng*, service of the writ and statement of claim in question were effected by A.R. registered post to the defendant at his Jalan Inai address. However, the defendant averred that he was not at the Jalan Inai address and had been at a different address at No. 76, Persiaran Duta Nusatara, Jalan Sri Hartamas 1, 50480 Kuala Lumpur until January 2013. Significantly, this other address at No. 76, Persiaran Duta Nusantara, Jalan Sri Hartamas 1, 50480 Kuala Lumpur, was known to the plaintiff and was used in an application by the plaintiff for substituted service in respect of bankruptcy proceedings against the plaintiff.

[34] In the ultimate, the Court of Appeal in *Chung Wai Meng* held, on the facts of the case, as follows: A

> [36] Applying *MBF Finance Bhd (Supra)* to the present case, the presumption under s.12 of the Interpretation Act 1948, being a rebuttable presumption, is rebutted by the Appellant's evidence that he had never been served with the Writ and SOC. It is for that reason that the Respondent was unable to exhibit the card for proving the Appellant's acknowledgement of service in the AOS. B

[35] Thus, the *ratio decidendi* in *Chung Wai Meng*'s case is based on a finding of fact that the plaintiff had successfully rebutted the presumption of service under s. 12 of the Interpretation Acts 1948 and 1967. C

[36] With respect to the decisions in *Yap Ke Huat* and *Sivamurthy*, and having regard to the decision in *Chung Wai Men*, it cannot be that the requirement of receipt of service of the writ by a defendant had been abandoned by O. 10 r. 1. Such a conclusion would be a major departure from the need for personal service of an originating process which has been a long D accepted basic principle of procedure. It would also make the requirement of personal service in that same rule, and the conditions precedent to effect substituted service of a writ, quite unnecessary and redundant. It would have very far reaching and draconian consequences. It would mean that even if a defendant were to show incontrovertibly that he had not been served with E the writ, such would be of no moment. Service would still be deemed to have been effected merely by proving, as fact, that the writ was sent by A.R. registered post. To do away with the need for actual service of a writ on a defendant would require a manifest intention to do so in clear and unambiguous language. I do not think O. 10 r. 1 goes that far. F

[37] The enquiry however, does not end here. If O. 10 r. 1 did not do away with personal service, and mere posting of a writ by A.R. registered post without more is not sufficient to deem that service had been effected; does permitting service by means of A.R. registered post imply the requirement of a positive acknowledgment by the defendant so served? G

[38] It must be borne in mind that in *Public Bank Bhd*, the construction there was of a clause in a guarantee. In addition, the A.R. cards in that case were returned with the endorsements "kembali tidak boleh di tuntut'. This made it abundantly clear that service was not effected. Conversely, it has been held by the Federal Court that merely by choosing to serve a notice by H means of A.R. registered post does not make it necessary that the A.R card must be returned duly acknowledged. This was the view expressed by the Supreme Court in *Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1; [1994] 1 MLJ 413. In the judgment of the court, Mohamed Dzaiddin SCJ (as he then was) stated that: I

> Therefore, on the proper construction of cl 17, since any notice may be sewed by sending the same through the post addressed to the last known address of the addressee, in our view, the deeming provision applies to the said notice, whether or not it is sent by AR registered post. Clause 17 does not provide that the notice should either be sent by registered post or AR registered post, and the fact that these words were omitted from cl 17 cannot justify the court reading those words in cl 17 as was done by the learned judge. In the context of cl 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR card was returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.

[39] In *Amanah Merchant Bank Bhd,* the clause in question, cl. 17 provided as follows:

> 17 Any notice may be served on the undersigned or his/their executors, administrators or legal representatives either personally or by sending the same through the post in an envelope addressed to the last known place of address of the person to be served and a notice so sent shall be deemed to be served on the day following that on which it is posted.

[40] Thus, for the purpose of cl. 17 in *Amanah Merchant Bank Bhd*, mere posting by AR registered post was held to suffice.

[41] Thus, rather than being a burden, the choice of effecting service by A.R. registered post presents a risk ie, a risk that the A.R. card may be returned with the reason that service could not be effected making it manifestly clear that service was not effected. However, it is not the same if an A.R. card is returned silent – with no acknowledgement of receipt and nothing written on that portion of the A.R. card intended to be filled by the recipient. In such an event, there is neither evidence of service nor failure of service.

[42] Order 10 r. 1 of the Rules of Court 2012 is silent as to whether service by A.R. registered post requires a positive acknowledgement of the addressee. May, or should, the court imply and have read into O. 10 r. 1 this requirement? I am of the view that the court may not and should not do so for several reasons.

[43] To begin with, making such an implication would call for reading into s. 12 words that are not there. To this, I would add that there is also no necessity to do so. If such an implication is to be made, it would strip from service by A.R. registered post any efficacy that it may have. It would render this alternative mode of service otiose. All that a defendant would have to do is merely to refuse acknowledging receipt on the A.R. card and service would be defeated.

[44] By not implying that service by A.R. registered post under O. 10 r. 1 imposes the additional requirement of an acknowledgment of receipt on the A.R. card by the defendant served does not, however, mean that there is no safeguard to protect the interest of a defendant who was not actually served.

[45] As stated, O. 10 r. 1 did not do away with the need for receipt of the writ to be served. It does not go as far as that. However, O. 10 r. 1 has to be read in conjunction with s. 12 of the Interpretations Act 1948 and 1967.

[46] The term used in s. 12 is "service by post". I am of the view that this term used is wide enough to encompass "A.R. registered post". A.R. registered post is still a form of post but with additional features. The additional features of an A.R. registered post do not, in themselves, derogate from the fact that it is still a form of service by post. As was stated by Devlin J in *TO Supplies (London) LD v. Ferry Creighton LD* [1952] 1 KB 42 at p 45, which was quoted with approval by the Supreme Court in *Amanah Merchant Bank Bhd* at p 419:

> It appears to me that the word 'post' in its ordinary and natural meaning is wide enough to cover both registered and ordinary post, and I do not think that it is possible to limit it to one or the other,
>
> ... A letter which is carried through the post, whether registered or not, is still 'posted' in the ordinary sense, and registration is merely one way of posting a letter.

[47] If O. 10 r. 1 is read in conjunction with s. 12 of the Interpretation Acts 1948 and 1967, the net result is that should service by A.R. registered post be chosen over personal service, there is then a concession provided by s. 12. The concession is that there shall be a presumption that service had been effected. However, being merely a presumption, the presumption afforded under s. 12 is rebuttable. A defendant is always at liberty to try to rebut that presumption (see *MBF Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ 38 and also the recent case of *Anna Yap May May v. Tetuan Lim Aik Huck & Company* [2017] 1 LNS 2104; [2018] 2 AMR 423), as the defendant in *Chung Wai Meng* successfully did. This then is the safeguard to protect the interest of defendants who were not actually served with the writ. For these reasons I respectfully prefer the view expressed on this issue by the Court of Appeal in *Chung Wai Meng* over those in *Yap Ke Huat* and *Sivamurthy*.

[48] In this case, there is evidence in the form of the affidavit of service that service of the writ and statement of claim were effected by means of A.R. registered post. However, the A.R. card was not acknowledged. This can be seen in exh. "ZMS5" to the respondent's affidavit in reply. As held above, O. 10 r. 1 of the Rules of Court 2012 neither requires that the A.R. card be returned acknowledged by the defendant to be served nor should the court imply such a requirement.

[49] However, does the return of the A.R. card unacknowledged negate the presumption under s. 12 of the Interpretations Act 1948 and 1967 or preclude its application? I do not see why it should. Section 12 does not require any acknowledgment of receipt under an AR card or otherwise, for the presumption to arise. There is also no logical reason why an acknowledgement of receipt should be a requirement under s. 12, particularly since s. 12 merely affords a rebuttable presumption of service. The absence of an acknowledgement of receipt obviously would not prevent rebuttal of the presumption under s. 12.

[50] The question therefore is, has the appellant rebutted the presumption under s. 12 of the Interpretations Acts 1948 and 1967 that he had been served with the writ and statement of claim? I do not think so. The appellant merely denies receipt of the writ and statement of claim. He points to the absence of any acknowledgement by him in the AR card. I do not think this is sufficient to rebut the presumption of service under s. 12, particularly, in the circumstances of this case.

[51] Throughout the entire case the address of the appellant had been a constant. The appellant's address at No. AL 10, Jalan Tioman 2, Taman Setapak had remained the same. That address appears in the construction agreement of 3 May 2013 and the supplemental agreement of 2 March 2015 between the parties upon which this action is mounted. It is also the address to which the respondent's solicitors' letters of demand of 28 July 2015 and 15 March 2016 were sent. It was the address at which execution of the judgment in default was carried out by the court bailiffs. In addition, that was the address to which the respondent's solicitors' second letter of demand of 15 March 2016 was sent and in respect of which the A.R. card was returned signed by the appellant with his national identity card number written on it. It was only when execution was levied that the appellant took steps to set aside the judgment in default.

[52] As a related issue, the appellant also asserts that the copy of the affidavit of service exhibited in the respondent's affidavit in reply as exh. "Z3" does not contain a copy of the writ and statement of claim that were exhibited in the original affidavit of service. The appellant contends that this is not in compliance with O. 41 r. 11(1) and O. 13 r. 7(b) of the Rules of Court 2012. Both the orders are set out below:

> 11. Document annexed to affidavit (O. 41, r. 11)
>
> (1) Any document to be used in conjunction with an affidavit shall be exhibited and a copy thereof annexed to the affidavit.
>
> 7. Proof of service of writ (O. 13, r. 7)
>
> 7. (1) a judgment shall not be entered against a defendant under this order unless:

(a) the plaintiff produces a certificate of non-appearance in Form 12; and

(b) either an affidavit is filed by or on behalf of the plaintiff proving due service of the writ on the defendant, or the plaintiff produces the writ endorsed by the defendant's solicitors with a statement that he accepts service of the writ on behalf of the defendant.

(2) Where an application is made to the Court for an order affecting a party who has failed to enter an appearance, the Court may require to be satisfied in such manner as it thinks fit that the party is in default of appearance.

[53] The conditions set out in O. 13 r. 7 are for the purposes of securing a judgment in default. The requirements in O. 13 r. 7 are not in respect of applications to set aside judgments in default. In addition, there is no evidence to suggest that the affidavit of service did not exhibit copies of the writ and statement of claim to be served. In fact, para. 4 of the affidavit of service states that the writ and statement of claim are exhibited. No evidence to the contrary has been led. In addition, O. 13 r. 7(b) does not require the writ and statement of claim to be exhibited in an affidavit of service before a judgment in default may be secured thereunder. Therefore, I find no merit in this contention of the appellant.

[54] Having regard to the foregoing, I find that the presumption under s. 12 of the Interpretation Acts 1948 and 1967 applies such that there is a presumption that the appellant had been served with the writ and statement of claim and that presumption has not been rebutted by the appellant.

[55] The enquiry by the court however, does not stop here. That service of the writ and statement of claim had been effected merely means that the judgment in default was not irregular and may not be set aside as of right *ex debito justitiae*. However, a regular judgment in default may still be set aside if it can be demonstrated, with evidence, that the defendant has a *prima facie* defence on the merits of the case. This is in line with the well established principle enunciated in *Evans v. Bartlam* [1937] AC 473 which has been adopted and applied by the Federal Court. If any authority for this proposition is required, it may be found in the decisions of the Federal Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd* [1994] 1 CLJ 328; [1994] 1 MLJ 312 and *Syarikat Joo Seng & Anor v. Habib Bank Ltd* [1986] 1 LNS 91; [1986] 2 MLJ 129.

Does The Appellant Have A *Prima Facie* Defence On The Merits?

[56] The respondent's claim in the action is for payment under a construction agreement. The construction agreement was entered into between the respondent (as the "land owner") and the appellant (as the "contractor") dated 3 May 2013. Under this agreement the respondent was to construct a dwelling house for the appellant.

[57] The appellant contends that he has a meritorious defence to this action. The appellant claims that there are defects and damage in the house that was built for him by the respondent. Despite his informing the solicitors who prepared the construction contract to give notice of this to the respondent, he claims he has not heard from the respondent. The appellant also contends that the respondent had failed to secure the "certificate of fitness" and the "architect's certificate" in breach of cls. 11.4 and 12 of the construction contract.

[58] Despite his allegation of defects and damage, the appellant has not produced any particulars of such defects or damage. He has not produced any evidence of any such defects either by himself on oath or otherwise. The nature or existence of these alleged defects and damage remains undisclosed. This bare assertion without particulars therefore does not amount to evidence of any defect or damage. It is merely a general allegation without particulars and therefore without evidence of the defects or damage complained of.

[59] Clauses 11.4 and 12 of the construction contract state as follows:

> 11.4 Upon the issuance of a certificate by the Architect that the Construction of the said Building has been practically completed (with electricity wiring and water pipes ready for connection of supply to the said Building) in accordance thereof and provided the Land Owner shall have paid all monies and performed the terms and covenants on this part herein contained to be observed the Contractor shall let the Land Owner into possession of the said Building PROVIDED THAT such possession shall not give the Land Owner right to occupy the said Building until such time as the Certificate of Fitness for Occupation is issued by the Appropriate Authorities. Upon the expiration of Fourteen (14) days from the receipt of a notice in writing from the Contractor informing the Land Owner to take delivery of the said Building not withstanding that the Land Owner shall be deemed to have taken vacant possession of the said Building and the Contractor thereafter shall not be liable for any loss or damage too the said Building and/or to the fixtures and fittings thereof.
>
> 12. CONTRACTOR TO OBTAIN CERTIFICATE OF FITNESS
>
> The contractor shall, if necessary by obligatory, do all acts and things necessary to assist the Architect to procure the issuance of the Certificate of Fitness for Occupation in respect of the said Building. The cost shall be borne by the Land Owner.

[60] The allegation that the respondent has breached cls. 11.4 and 12 is again bereft of particulars. Clause 11.4 is an obligation to assist the architect. There is no evidence from any architect that assistance required under cl. 11.4 was not provided by the respondent. There is no evidence or even assertion that the conditions precedent to the respondent's obligation in cl. 12 had been complied with – particularly, the proviso therein. In

addition, it does not follow that a breach of either or both of these clauses provide any defence to the respondent's claim for payment under the construction contract. The breaches may afford the appellant basis for a counterclaim but such is not necessarily a defence to the claim. Indeed, it is also significant to note that no attempts have been made by the appellant to pursue these alleged breaches. If these allegations are offered as defences to the action, they must have existed when the action was filed. That was more than a year after the writ was issued. Yet, no claim or action had been made or filed against the respondent.

[61] For the reasons stated above, I hold that the appellant has not established that he has any *prima facie* defence on the merits of the respondent's claim in this action.

Alleged Conflict Of Interest

[62] Over and above the foregoing contentions, the appellant also alleges that one of the advocates and solicitors in the respondent's firm of solicitors is in a position of conflict. It is alleged that the appellant had called on him and had asked him to assist in having the defects and damage found addressed by the respondent. This advocate and solicitor had also witnessed the execution of the construction contract in issue by the appellant. The advocate and solicitor may therefore be called as a witness in the trial of the action.

[63] I do not see that the objections here are relevant to the application for setting aside the judgment in default or, indeed, are made out. These objections do not render the judgment in default irregular or provide a defence to the claim by the respondent on the merits. These are matters that are more appropriately the concern of the disciplinary board of the Malaysian Bar.

[64] In addition, no appearance had been entered to this action by the appellant. Therefore, no issue of conflict could have arisen. The issue of the advocate and solicitor concerned having to testify has also not arisen. Whether he would, or have to, testify are issues the consideration of which are premature in respect of a judgment in default of appearance. Besides, it does not follow that the entire firm need be disqualified (see *Berjaya Land Bhd v. Wong Chee Hie & Ors* [2012] 4 CLJ 356; [2012] 8 MLJ 129).

[65] I therefore hold that there is no merit to this contention raised by the appellant.

Conclusion

[66] In light of the foregoing, the appellant's appeal against the decision of the learned Magistrate of 11 December 2017 is dismissed with costs of RM5,000.